89- 1429

PETITION FOR WRIT OF CERTIORARI

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JESUS GUERRERO, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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50 pp

QUESTIONS PRESENTED

1. DID OFFICER CORTEZ HAVE REASONABLE SUSPICION TO STOP THE DEFENDANT'S AUTOMOBILE BASED ON THE OFFICER'S BELIEF THAT THE DEFENDANT WAS NOT WEARING HIS SEAT BELT?

2. DID OFFICER CORTEZ HAVE PROBABLE CAUSE TO SEARCH THE DEFENDANTS CAR AND TRUNK AFTER GIVING THE DEFENDANT A WARNING FOR NOT WEARING HIS SEAT BELT AND THEN FURTHER DETAINING AND QUESTIONING THE DEFENDANT AFTER THE OFFICER DETERMINED THAT THE DEFENDANT WAS FREE TO GO?

3. DID THE TENTH CIRCUIT IMPROPERLY DISREGARD THE OFFICER'S TESTIMONY THAT HE HAD NO REASON TO ASK THE DEFENDANT ABOUT GUNS AND CONTRABAND AND INSTEAD SUBSTITUTE ITS OWN VERSION OF THE OFFICER'S TESTIMONY THAT HE REALLY MEANT, "I DIDN'T ASK HIM FOR ANY SINGLE REASON."?

4. DID THE DEFENDANT KNOWINGLY AND VOLUNTARILY CONSENT TO THE SEARCH OF HIS CAR

IN LIGHT OF THE PROLONGED INVESTIGATION BY OFFICER CORTEZ AND WITHOUT SPECIFICALLY ARTICULATED REASONS FOR THE INVESTIGATION AND THE SUBSEQUENT SEARCH?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

JESUS GUERRERO, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, JESUS GUERRERO, respectfully requests that a Writ of Certiorari issue to review the Order and Judgment of the United States Court of Appeals, Tenth Circuit, entered in the above-entitled proceeding on December 11, 1989.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is unreported and reprinted in the appendix hereto. The Judgment of the United

States District Court for the District of New Mexico, is reprinted in the appendix hereto. The oral findings of fact entered by the United States District Court for the District of New Mexico are reprinted in the appendix hereto.

JURISDICTION

The Order and Judgment of the Tenth Circuit Court of Appeals was filed on December 11, 1989. The jurisdiction of this Court is based on 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution states that it is "the right of the people to be secure...against unreasonable searches and seizures..."

STATUTES INVOLVED

Section 66-7-372 (Repl. Pamp. 1987) of the New Mexico Statutes Annotated, 1978, states that "each front seat occupant of a passenger car manufactured with safety belts in compliance with federal motor vehicle safety standard number 208 shall have a safety belt properly fastened about his body at all times when the vehicle is in Motion, unless all seating positions equipped with safety belts are occupied."

HOW THE FEDERAL QUESTION WAS PRESENTED

On September 28, 1988, Defendant's counsel filed a Motion to Suppress Evidence of marijuana obtained in the search of the Defendant's car. The Motion raised issues 1, 2, and 4 in this Petition. A hearing was held regarding this motion and testimony was heard

from Officer Cortez, the arresting officer, and from the Defendant. The motion was denied.

Defendant entered a plea agreement with the United States, pleading guilty to one charge of possession of marijuana with intent to distribute. 21 U.S.C. Section 841 (a)(1) and (b)(1)(B). In the plea agreement, the defendant reserved the right to appeal the denial of his Motion to Suppress by the United States District Court for the District of New Mexico.

The Tenth Circuit Court of Appeals considered issues 1, 2, and 4, in this Petition, and held against the Defendant. Its jurisdiction was based on 28 U.S.C. Section 1291 and Article III of the United States Constitution.

STATEMENT OF THE CASES

A. THE STOP

On May 23, 1988, Officer Cortez, of the New Mexico State Police, stopped the Defendant for an alleged seat belt violation. At the time, Officer Cortez had only been on patrol as a fully commissioned police officer, for a few months. He had never been involved in a drug investigation or arrest.

Officer Cortez spotted Guerrero's car on the opposite side of a divided interstate highway. Guerrero was traveling northbound at about 60 mph and Cortez was traveling southbound at about 55 mph. The cars were separated by a 35 foot median. Cortez observed Guerrero's on-coming car for about 4 seconds before deciding to pull him over.

Officer Cortez saw that Guerrero was not wearing a shoulder harness, so he crossed the median and stopped him. He testified that he knew that this model and year of car came

with factory equipped shoulder type seat belts. Officer Cortez testified that there was no way to tell if Guerrero was wearing his lap belt. Cortez stated that wearing a lap belt complies with the seat belt law. When asked about his frame of mind when he pulled Guerrero over, Cortez stated that "All I was looking at is another citation to enter into my log."

B. THE INVESTIGATION

Officer Cortez asked Guerrero for his driver's license, which Guerrero produced. Officer Cortez then requested Guerrero's car registration, which was also turned over to Cortez. According to Cortez, these requests were orders given by him to Guerrero, and if Guerrero had failed to comply with them, he would have been in violation of state law.

Cortez then told Guerrero he had been stopped for not wearing his seat belt. The Defendant said he has been wearing his lap

belt. There was no shoulder harness in his car for his seat belts. Guerrero's car was equipped with the brackets for a shoulder harness but the straps had been removed prior to Guerrero purchasing the car. Cortez told Guerrero he was going to give him a verbal warning about the seat belt. While Guerrero got his registration from his glove compartment Cortez noticed a strong odor of air freshener coming from the car and saw a spare tire, jack, suitcase and blanket in the backseat.

After Cortez gave Guerrero the verbal warning, he continued to question Guerrero although he had concluded his investigation at that point. [Question] "Was there any reason for you to stay there with Mr. Guerrero in uniform, still talking to him at that point in time after you had concluded, giving him your verbal warning?" [Answer by Cortez] "There was no reason." Cortez was satisfied, at this

point, that Guerrero had not committed any other traffic offenses. According to Cortez, Guerrero was free to go. However, Cortez never told Guerrero he was free to go and he admitted that he never indicated to Guerrero that the conversation was over. During this time, the lights on Cortez' police car were still flashing. Guerrero did not leave, because Cortez never told him or indicated to him that he could go. Guerrero never felt free to go.

At this point, Cortez claims Guerrero offered him a large sum of money. Guerrero denies this claim. Cortez stated that it seemed unusual that Defendant would try to offer him money after he had merely given Guerrero a verbal warning about his seat belt. It never occurred to Cortez to arrest Guerrero for bribery.

Cortez then asked Guerrero if he was carrying guns or contraband. Cortez admitted

that he did not know why he had asked the question and just wanted to see what Guerrero's reaction would be. [Question] "So then for what reason did you ask him if he had guns or contraband? [Answer by Cortez] "Because, no reason. I didn't ask him for any reason. Just...I just asked him." [Question] "Did you just kind of throw that question out kind of just to see what he would do with it." [Answer by Cortez] "Yes, I did." [Question] "Was he still free to just get in his car and drive off if he would have wanted to?" [Answer by Cortez] "Yes, he was."

C. THE SEARCH

Approximately 10-15 minutes had elapsed by this time. Cortez then asked Guerrero if he could search his car. Cortez said he made this request because of how Guerrero was acting.

Cortez claims that Guerrero verbally consented to the search. However, Guerrero

contends that Cortez told him to open the trunk. Guerrero perceived Cortez' statement as an order, not a request. Cortez used the same tone of voice in requesting the search, as he used when he asked for Guerrero's driver's license and registration. During this time, the lights were still flashing on the police car. Cortez reiterated that Guerrero was free to go at the time he gave Guerrero's license and registration back to him, although he never told Guerrero he was free to go.

Cortez found what was suspected to be marijuana wrapped in paper and garbage bags in the trunk of Guerrero's car. Cortez had been taught at the police academy that it was recommended that officer's use consent forms when conducting searches. However, Cortez does not know why this is a recommended practice. A consent to search form was not used in this case.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW THAT OFFICER CORTEZ PROPERLY STOPPED THE PETITIONER'S CAR BECAUSE PETITIONER WAS NOT WEARING A SEAT BELT SHOULDER HARNESS RAISES IMPORTANT AND UNRESOLVED PROBLEMS ABOUT WHETHER THIS CONSTITUTED A PRETEXTUAL STOP

"A pretextual stop occurs when the police use legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop." U.S. v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988). Undefined use by an officer of his authority to stop vehicles for minor traffic offenses, and then investigate the driver for a much more serious offense, without cause, jeopardizes the liberty of all men to the arbitrary exercise of state authority. See Terry v. Ohio, 392 U.S. 1 (1968).

In the present case, Officer Cortez admits that only a warning was given for the seat belt violation but he continued to investigate for some unknown, serious crime. When asked about why he detained and questioned Guerrero after the warning, he said, "There was no reason." And, when asked why he later asked about drugs and contraband, he said, "Because, no reason." This is the type of undefined use of authority prohibited by Terry v. Ohio, and it is particularly suspect in a case involving only a warning for not wearing a seat belt.

The Tenth Circuit in U.S. v. Guzman adopted a test for determining whether an investigatory stop is unconstitutional. "A Court should ask not whether the officer could validly have made the stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." Id. at 1517 (quoting, U.S. v. Smith, 799 F.2d 704 (11th Cir. 1986). A

stop is invalid if it is clear that an officer would have been uninterested in pursuing the lesser offense, absent that hope. Id.

In the present case, the officer's actions raise questions about whether the stop was pretextual, because the officer observed the Defendant at 55 mph, going in the opposite direction, on an interstate highway and across a 35 foot median. The officer only had a few seconds to observe the Defendant. These circumstances call into question the legality of the stop, especially since New Mexico law only requires that a person wear a "safety belt" and "safety belt" is not defined. In the present case, the officer stated that wearing a lap belt complies with New Mexico law and that he could not tell if the Defendant was wearing a lap belt. The District Court further found that Guerrero was wearing his lap belt at the time he was stopped by Cortez.

Whether an officer can stop a motorist for not wearing a seat belt is an important question for this Court because there is very little case law on the issue. Also, allowing officers to stop a car for a seat belt violation alone raises important implications regarding a driver's Fourth Amendment Rights and expands the possible abuse of using these type of stops for pretextual investigations.

THE DECISION BELOW THAT THE OFFICER HAD PROBABLE CAUSE TO FURTHER INVESTIGATE AND SEARCH THE DEFENDANT'S CAR AFTER MERELY WARNING THE DEFENDANT ABOUT THE SEAT BELT VIOLATION AND DETERMINING THAT THE DEFENDANT WAS FREE TO GO, AND ALSO AFTER FAILING TO ARTICULATE REASONS FOR THE PROLONGED INVESTIGATION, PRESENTS IMPORTANT AND UNRESOLVED PROBLEMS ABOUT WHETHER THE DEFENDANT'S FOURTH AMENDMENT RIGHTS HAVE BEEN VIOLATED

The Guzman case established that the circumstances of the stop dictate whether constitutional parameters have been overstepped in the investigation that follows. In the present case, Officer Cortez proceeds,

without cause, to detain and investigate the Defendant, greatly beyond the reason for the original stop (the seat belt violation).

Officer Cortez admits that he did not have any reason to detain the Defendant and also that he did not have any reason to ask him about drugs and contraband. Cortez stated that he asked Guerrero about drugs and contraband just to see what the answer would be. He also stated that this detention and questioning occurred after the seat belt investigation was completed and after he had determined that the Defendant was free to go. This violates the rule that an investigation after a traffic stop must be reasonably related to the reason for the stop. Terry v. Ohio; U.S. v. Corral, 823 F.2d 1389 (10th Cir. 1987); People v. McGaughran, 159 Cal Rptr. 191, 601 P.2d 207 (1979)(enbanc); U.S. v. Guzman. Furthermore, when a detention becomes an excuse to search for possible illegal

contraband, it is unreasonable and unconstitutional if it is not supported by probable cause. State v. Ruud, 90 NM 647, 567 P.2d 496 (Ct. App. 1977).

Although Officer Cortez noticed that the Defendant was nervous, that the interior of his car smelled like air freshener, and that his back seat contained a spare tire, jack, suitcase, and blanket, he did not give these facts as reasons to question and search for contraband and drugs. The officer claims that the Defendant then attempted to bribe him, but this is disputed by the Defendant. Instead, the officer states that he did not have any reason to search. He determined that the Defendant was free to go after he had observed these items. An officer must articulate his reasons to support probable cause to search, or the search is unconstitutional. McDonald v. U.S., 335 U.S. 451 (1948); U.S. v. Montgomery, 561 F.2d 875 (d.C. Cir. 1977); In

Re Tony C., 148 Cal. Rptr. 366, 582 P.2d 957 (1978)(enbanc); U.S. v. Jordon, 530 F.2d 722 (6th Cir. 1976).

THE TENTH CIRCUIT'S DECISION THAT THE OFFICER DID NOT MEAN THAT HE HAD NO REASON TO SEARCH, ALTHOUGH HE STATED THIS, THIS IMPROPERLY SUBSTITUTES THE TENTH CIRCUIT'S VERSION OF THE FACTS IN PLACE OF THE OFFICER'S ACTUAL TESTIMONY

On cross-examination, when asked why he asked the Defendant if he had any contraband, the officer stated, "Because, no reason. I didn't ask him for any reason." The Tenth Circuit stated, that in the context of the case, the officer meant, "I didn't ask him for any single reason." The Tenth Circuit then stated that the context of the officer's testimony indicates that he asked about drugs and contraband because of the items in the backseat, the air freshener and attempted bribe.

This reasoning by the Court violates the previously cited principle that an officer

must articulate facts to support a finding of probable cause to investigate and search. Furthermore, the Tenth Circuit has altered its version of the facts, contrary to the officer's actual testimony. Only a trier of fact can draw inferences from testimony given at trial. U.S. v. Dyer, 546 F.2d 1313 (7th Cir. 1976); U.S. v. Liefer, 778 F.2d 1236 (7th Cir. 1985). Furthermore, a conviction cannot rest on an unwarranted factual inference, the determination of which is a matter of law. U.S. v. Fitzharris, 633 F.2d 416 (5th Cir.), cert. denied, 451 U.S. 912 (1980).

In the present case, the officer's articulation of his reasons for the search is what is important. This determination is crucial to whether probable cause existed for the investigation and search. The Tenth Circuit's re-wording of the officer's testimony significantly changes its meaning and is modified so as to fulfill the legal

requirements of probable cause. Taking the testimony as is from the Trial Court indicates that Cortez did not have probable cause to investigate or search for drugs.

THE DECISION BELOW THAT THE TRIAL COURT'S RULING THAT THE DEFENDANT VOLUNTARILY CONSENTED TO THE SEARCH OF HIS CAR WAS NOT CLEARLY ERRONEOUS IS AN IMPORTANT QUESTION TO RESOLVE DUE TO THE PRETEXTUAL NATURE OF THE STOP AND SEARCH AND ITS COERCIVE SETTING

Officer Cortez was unable to state why he wanted to search or what he was searching for. He continued to question the Defendant after his seat belt investigation was completed. The Defendant did not feel free to leave. The Defendant was shadowed by the Officer's authority throughout the investigation. When a driver has produced a valid license, as in the present case, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning. U.S. v. Guzman.

These circumstances, along with the pretextual nature of the stop and search previously discussed, indicate that the Defendant was in a coercive situation, and felt that he had no choice but to comply with the officer's requests. See Schneckloth v. Bustamante, 412 U.S. 218 (1973); U.S. v. Lopez, 777 F.2d 543 (10th Cir. 1985); U.S. v. Recalde, 761 F.2d 1448 (10th Cir. 1985); U.S. v. Abbott, 546 F.2d 883 (10th Cir. 1977). Any consent following an illegal detention is tainted and invalid. U.S. v. Thompson, 712 F.2d 1356 (11th Cir. 1983); U.S. v. Jefferson, 650 F.2d 854 (6th Cir. 1981).

This Court should review the consent to search in light of the reasons for the stop and the prolonged detention and investigation. Allowing an officer to search after he has detained a driver for a significant period of time, with no articulated reasons, severely infringes upon the driver's Fourth Amendment

rights. The Tenth Circuit's decision in the present case is contrary to Fourth Amendment standards and its own opinion in U.S. v. Guzman.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted. This Petition raises important questions of constitutional law which affects a person's Fourth Amendment right to be free from unreasonable searches and seizures.

RESPECTFULLY SUBMITTED,
WALZ & FRENCH

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APPENDIX

PART A

ORDER AND JUDGMENT OF THE TENTH CIRCUIT

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JESUS GUERRERO,

Defendant-Appellant.

No. 89-2005
D.C. NO. 88-370JP-01)
(District of New Mexico)
[Filed: December 11, 1989]

ORDER AND JUDGMENT[1]

Before MCKAY, SEYMOUR, and ANDERSON, Circuit Judges.

Defendant entered a plea agreement to a charge of possession of marijuana with intent to distribute, reserving the right to appeal the denial of his suppression motions. The Defendant was stopped by a rookie policeman

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[1]This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing he doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. 36.3

who testified that he routinely stopped automobiles if he observed that the drivers were not wearing seat belts. Although New Mexico law requires only that drivers wear lap belts, there was evidence that most automobiles are equipped with shoulder harnesses for drivers; and based on the fact that the defendant was not wearing a shoulder harness, the officer stopped him for violation of the seat belt law. It turned out that the defendant was in fact wearing a lap belt and that the shoulder belt had been cut and all that remained were the upper hook, seat belt bracket, and floor mount. In light of Terry v. Ohio, 392 U.S. 1 (9168), and our many cases interpreting its provisions, we are satisfied that this investigative stop met constitutional standards. See, e.g., United States v. Rivera, 867 F.2d 1261, 1268-64 (10th Cir. 1989) (officer's stop of defendant's car held proper where officer observed car

"tailgating"); United States v. Recalde, 761 F.2d 1488, 1455 (10th Cir. 1985) (initial stop held property where vehicle was speeding); cf. United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988) (suggesting that stop based on failure to wear seat belt is proper if seat belt violation is not merely pretextual basis for stop).

When the officer asked defendant to produce his vehicle registration from his glove box, the officer testified that he smelled a strong odor of air freshener and saw a jack, a spare tire, a blanket, and a suitcase in the rear seat. The officer testified that he thought this was unusual because those items normally belong in the trunk. The officer further testified that he returned defendant's driver's license and registration to him, telling him that he was only going to receive

a verbal warning for a seat belt violation.[2] the officer testified that the defendant then removed a large amount of cash from his shirt pocket and said: "Here is some money for your trouble.: Record, vol. 2, at 40-41. The officer further testified that the defendant continued to approach him, urging him to accept the money. The officer backed away, and at some stage asked the defendant if he had any weapons or contraband, to which the defendant replied, "No." The officer then testified that he said: "Excuse me sir, do you mind if I look in your vehicle?" In response, the defendant retrieved his key and opened the trunk. Id. at 41-43. It was in the trunk that the officer discovered the marijuana. On cross examination, the officer was asked why he had asked defendant if he had

[2]Although it is not clear why the officer issued a warning after discovering the defendant was actually wearing a lap belt, we are satisfied that the stop was proper as discussed above.

any guns or contraband. The officer answered: "Because, no reason. I didn't ask him for any reason." Id. at 75.

Based on this scenario, defendant challenges his further detention and questioning after the officer had determined that he was only going to issue a warning ticket for the matter which caused the initial stop. While the officer's answer on cross-examination literally says he had no reason to continue to investigate, we are satisfied that in context the officer meant no such thing. In context it is more likely the officer meant "I didn't ask him for any single reason." In any event, this one statement does not undermine the balance of his testimony which supports his further investigation. An examination of the officer's testimony in context makes it clear that his reason for continuing the investigation was the presence of items in the rear seat which fit smuggling profiles, the

presence of air freshener, and the offer of a bribe together with his concern about safety which led him to ask about guns or contraband. The officer's testimony, which was credited by the trial judge, fully justified the continued investigation, including the request to look in the trunk of the car. The officer had probable cause to request permission to examine the content of the car's trunk.

Finally, the defendant challenges the voluntariness of his consent to the search of the car. A defendant's consent to search is only legal and valid if it is freely and voluntarily given, as determined by the totality of the circumstances. Schneckloth v. Bustamante, 412 U.S. 218 (1973). In this case, the testimony about the voluntariness of the consent is typical testimony concerning a traffic stop followed by a search for suspicious contraband. The officer's lights were flashing, he wore a badge, and he used an

authoritative tone. The officer's testimony, among other things was that the defendant readily responded and appeared not to object at all when asked to open the trunk. The trial court heard the witnesses and weighed the evidence. We cannot say that the trial court's finding of voluntariness was clearly erroneous.

AFFIRMED.

Entered for the Court

Monroe G. McKay
Circuit Judge

PART B

JUDGEMENT IN A CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA
V.

NAME: JESUS GUERRERO
DOB: 04-21-56
SSN: 360-68-7951
MAILING ADDRESS: 212 South Lakewood
NORTHLAKE, ILLINOIS 60164

JUDGMENT IN A CRIMINAL CASE
CASE NUMBER: 88-370JP-01
[Filed: December 19, 1988]

JERRY WALZ - Retained
Attorney for Defendant

RESIDENCE ADDRESS: 212 South Lakewood
Northlake, Illinois 60164

THE DEFENDANT ENTERED A PLEA OF:

[X guilty ___ nolo contendere] Indictment filed August 10, 1988

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Possession with Intent to Distribute more than 100 Kilograms of Marijuana in violation of 21 USC 841(a)(1) and 21 USC 841(b)(1)(B) as charged in Indictment filed on August 10, 1988.

The following sentence is imposed pursuant to the Sentencing Reform Act of 1984 as this Court has made no determination that the sentencing guidelines are unconstitutional; however, the Court intends to impose an

alternative sentence under prior law which shall be controlling, in the event the Sentencing Guidelines are, in fact, declared unconstitutional.

The Court finds that there is no need for evidentiary hearing as there are no disputed facts.

Therefore, pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Jesus Guerrero is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a period of sixty (60) months. Further, upon release from confinement, the defendant shall be placed on Supervised Release for a term of four (4) years, which the usual conditions of Supervised Release and a special condition that he not possess a firearm or any other dangerous weapon.

Based on the defendant's inability to pay, the Court will not impose a fine nor an additional fine which would pay government cost of any imprisonment, probation, or Supervised Release.

The Court finds that the defendant does not pose a flight risk nor does he present a danger to the community, therefore, he shall be released under the same conditions of release as previously imposed during the pendency of his appeal.

Further, in the event that the sentencing guidelines are found to be unconstitutional, it is the judgment and sentence of the Court that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of five

(5) years, with a four (4) year term of Supervised Release to follow.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on Page Two of the judgment are imposed.

NAME: JESUS GUERRERO
CASE NUMBER: 88-370JP-01

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 50.00 pursuant to Title 18, U.S.C. Section 3013 Indictment filed August 10, 1988 as follows:

Payable immediately to the U.S. Court Clerk, P.O. Box 689, Albuquerque, New Mexico 87103

IT IS FURTHER ORDERED that the defendant shall pay to the Clerk of Court for this district, any amount imposed as a fine or special assessment. The defendant shall also pay to the Clerk of Court, any amount imposed as a cost of prosecution. RESTITUTION should be paid to the U.S. Attorney.

IT IS FURTHER ORDERED that until the judgment is paid in full, the defendant shall notify the United States Attorney of any change in address within 30 days of that change.

IT IS FURTHER ORDERED that the clerk of the Court deliver a certified copy of this judgment to the United States marshal of this district.

December 16, 1988
Date of Imposition of Sentence

_____
Signature of Judicial Officer

JAMES A. PARKER, U.S. DISTRICT JUDGE
Name and Title of Judicial Officer

_____
Date

APPEAL RIGHTS: In accordance with Rule 32(a) of the Federal Rules of Criminal Procedure, defendant has the right to appeal the entry of this judgment within ten (10) days and has the right to apply for leave to appeal *in forma pauperis* if unable to pay the cost of an appeal.

PART C

ORAL FINDINGS OF FACT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

RECORD ON APPEAL, UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, VOL. I, PAGES 124-129.

THE COURT: I'm going to deny the motion to suppress. I'm going to deny the motion to suppress on the following findings:

I will find that Officer Cortez, the New Mexico State Policeman, was patrolling on the Interstate 25 and was traveling south on the inside lane of Interstate 25 somewhere between Wagon Mound and Las Vegas. He observed an automobile, a 1978 Cadillac De Ville, being driven by the defendant going north also on the inside lane, that is the lane next to the median.

When he observed the driver of the automobile, he observed that the driver of the automobile was not wearing a shoulder harness, that is a shoulder -- that part of the seat belt so called which fits over the shoulder and fastens on down to the seat.

Officer Cortez immediately crossed the median, gave -- went in pursuit of the defendant in his Cadillac and stopped him. At

the time that he stopped him, he pulled him over to the right. Officer Cortez parked behind the defendant's car and the defendant got out of his car and went over to where the officer was. They had conversation. The officer asked Mr. Guerrero for his driver's license. Mr. Guerrero demonstrated his driver's license.

At that point the defendant -- I mean, excuse me, the officer asked the defendant for his registration, the registration to the automobile. They went to the defendant's car. The defendant got into the car. The officer stood by the door on the passenger's side. The defendant pulled out the registration certificate. While this was going on the officer detected a smell of disinfectant or some air freshener, detected the scent of air freshener in the automobile and also observed at some point there that the -- in the back seat was a spare tire, a blanket, a piece of

luggage and a jack. Now, these are ordinarily items that are carried in the trunk, and not in the passenger's portion of the automobile.

When the defendant showed the officer the registration certificate, possibly even before that, the officer indicated to him, the defendant, that he was going to give him a warning because of the seat belt. There was in the automobile the appropriate mechanisms for -- that is the latching mechanisms and the anchoring mechanisms for a shoulder harness, that part of the so-called seat belt. But there was nothing -- there was no shoulder harness in the automobile, although the mechanism for that type of a harness of mechanism was in place. There was a lap belt.

Now, whether or not the defendant was wearing a lap belt at the time that he was pulled over, of course, is not known for sure. I believe the defendant testified that he had that lap belt on. And I will go ahead and

accept his story on that. However, the lap belt was not something -- that is whether or not he had the lap belt on it's not something that the officer could be observed when he first observed the defendant coming toward him. The officer is going on the opposite direction.

Now, after the defendant demonstrated the registration, the officer indicated that so far as he was concerned at that point he was through with the defendant. And at this time the stories diverted, but I will find that this defendant did take out money and started proffering it to the officer. And the officer started backing away and -- indicating that he didn't, wouldn't take it.

And it was at that time that the officer asked the defendant if he had contraband or any weapons in the car. And the defendant answered in the negative. And the officer asked him, may I look at the car, may I search

-- may I see the car. The defendant indicated that he could. He, the defendant, went to the front of the car, that is the passenger's portion of -- the driver portion of the car, part of the car and got the keys out and went back and opened up the -- voluntarily opened up the trunk. And there were these, I mean these garbage sacks in which the marijuana was actually eventually found.

I feel that the -- that, one, the consent to search was freely and voluntarily made. I feel, that at the point where the money was proffered to that officer that the officer had -- could have had, and although he didn't say that he at that point had because he wasn't asked that question, he was asked his -- he was asked his impression as to whether or not he believed that -- had some suspicion that a crime was being committed or that the defendant might have had contraband. He indicated negatively that that was up until

the point that he -- up until the point where the money was offered to him.

At that point the money was offered to him, I can very well appreciate that -- and I didn't mention this before, but the defendant was nervous, his hands were shaking when first the defendant proffered the license, driver's license for inspection.

The circumstance, the air freshener, the smell of this air freshener which is commonly understood to -- commonly known to be used by people transporting marijuana to mask the marijuana smell, and the presence of the spare tire, the luggage, the blanket, and the jack in the passenger compartment of the car instead of in the truck where it is usually carried, those circumstances plus the offering of the money could lead a police officer of reasonable prudence to have a reasonable suspicion that something was amiss and that a crime was perhaps being committed in his

presence if there was contraband in that car.

All of those things justify his request or his inquiry to the defendant as to whether or not he would permit him, the officer, to search the car. All right. On those findings the motion to suppress will be denied.